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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ Of Certiorari To The Wisconsin Court Of Appeals, District IV

BRIEF OF SENIORLAW/LEGAL ACTION OF WISCONSIN, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTRODUCTION AND STATEMENT OF INTEREST[1]

Legal Action of Wisconsin, Inc., is a not-for-profit law firm with offices located in Madison, Milwaukee, and Kenosha, Wisconsin. Legal Action represents approximately 12,000 low income persons annually. Legal Action of Wisconsin has over 260,000 persons in its service territory whose incomes are below the federal poverty line. Most of Legal Action's clients are eligible for public assistance benefits.

SeniorLAW, a program of Legal Action, represents senior citizens in public assistance benefit matters such as Medicaid, Medicare, Social Security, SSI, and Food Stamps. As the Older Americans Act Title IIIB-funded legal service provider for Milwaukee, the largest urban area in the state, and also six additional counties in southeastern Wisconsin, SeniorLAW provides free legal services and advice to 1800-2000 senior citizens per year, supervises non-lawyer "benefit specialists" throughout the region that serve additional elderly clients in public benefits matters, and also provides community education to senior citizens and senior-serving professionals.

This case centers around a subsection of the "spousal impoverishment" provisions of the Medicaid Act, 42 U.S.C. § 1396 *et seq.* These spousal impoverishment provisions are at 42 U.S.C. § 1396r-5 (1994 & Supp. 2000). The

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[1] No counsel for either party authored this brief. No person or entity other than SeniorLAW/Legal Action of Wisconsin made any monetary contribution to the preparation or submission of this brief.

legislative intent in passing spousal impoverishment protections was "to assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity." H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65. Congress was particularly concerned about low-income community spouses, such as those affected by the dispute in this case, when enacting this legislation:

> The purpose of the committee bill is to end this pauperization by assuring that the community spouse has a sufficient – but not excessive – amount of income and resources available to her while her spouse is in a nursing home at Medicaid expense. This will be of particular benefit to older women, who, in the current generation at risk of nursing home care, have often worked at home all their lives raising families and have limited income other than their husband's pension checks.

H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65-68.

The people whom Congress sought to protect are the very people who become SeniorLAW clients. Having specifically noted the plight of low-income homemakers (generally wives), Congress could not have been so shortsighted as to provide for them to meet their needs only as long as their frail spouse survived. Yet, the income-first interpretation of 42 U.S.C. § 1396r-5(e)(2)(C) has this effect, in that the "quick fix" of attributing their frail spouse's income and requiring them to deplete necessary resources puts these spouses in long term poverty. As we have seen in our practice, when spouses have less resources to meet their needs, they more quickly become eligible for public assistance themselves, especially when

they become widows or widowers. The income-first method also forces these community spouses to be dependent on their frail institutionalized spouses for support as opposed to living independently in the community as contemplated by Congress. At the same time, income-first prevents institutionalized spouses from having flexibility to use their income to meet their own medical needs.

The consequences of using the income-first method in determining Medicaid eligibility are of great concern to our clients and thus to our organization. Additionally, we hope that the practical perspective our experience in representing frail and low-income elderly clients brings to this case will be of use to this Court. Consent of all parties has been given for the filing of this brief.

SUMMARY OF ARGUMENT

Other briefs on file with the Court in this matter already provide detailed explanations of the facts of this case, the enactment of the spousal impoverishment protections, the concepts known as "income-first" and "resource-first," and the applicable acronyms. This brief will not reiterate that information. Instead, this brief addresses several specific issues related to the income-first/resource-first debate.

First, concerns raised about the cost of using the resource-first method are inflated. The actual "cost" of resource-first is significantly lower than Petitioner's estimate (Pet. and App. for Writ of Cert. at 20; Pet. Brief on

the Merits at 45-47), because persons excluded from Medicaid eligibility under income-first will not remain ineligible for as long as Petitioner claims. Cases where resource adjustments were granted by virtue of resource-first do not evidence significant "asset sheltering" practices and fall far short of the over $300,000 resource levels predicted by Petitioner. Moreover, the rate of "new" cases that have become eligible under resource-first since the Wisconsin Court of Appeals' decision below is quite low, and would result in a cost of only $200,000 per year, which is negligible in the framework of the Medicaid budget as a whole. Additionally, the higher mandated cost share payment to the nursing facility that is created by the resource-first method lowers costs even further. In fact, in many cases the overall cost of resource-first could be lower than income-first.

Second, the notion of the "anticipatory hearing" put forth by Petitioner and *Amici* supporting Petitioner is incorrect, costly and unfair. It is incorrect because the fair hearing statute, § 1396r-5(e)(2)(A), provides for a hearing at the time of the application, not before. It is costly because it would require the state to hold hearings for a large number of individuals who might never even apply for Medicaid, wasting public dollars on a largely academic process. It is unfair to couples because such a hearing would require hearing examiners to rely on figures that, due to inflation adjustments, are most likely lower than those which will ultimately apply to the couple when they complete the application at some later date; thus causing couples to spend more resources than necessary.

Third, the resource adjustment hearing set forth at § 1396r-5(e)(2)(C) does not depend on all of the factors set

out in (e)(2)(A) because each of the hearing provisions addresses separate issues that can arise in a spousal impoverishment case. Thus, the placement of the resource adjustment provision within the fair hearing section does not compel consideration of all other spousal impoverishment factors, including the community spouse income allowance under § 1396r-5(d). Moreover, the placement and language of (e)(2)(C) mandate a resource-first approach. Since Congress specifically defined the concept of the transfer of income from the institutionalized spouse to the community spouse as the "community spouse income allowance", §§ 1396r-5(d)(1),(2), and did not include that defined phrase in (e)(2)(C), it follows that Congress did not intend for this allowance to be considered in determining whether the CSRA could be adjusted.

Fourth, the resource-first method does not make a nullity of the standard income allowance, since frequently even when all resources are kept, the community spouse's income still falls short, and thus an income allowance is permitted.

Fifth, resource-first appropriately balances the needs of the community spouse, the needs of the institutionalized spouse, and the need for couples to pay their "fair share" for nursing home expenses. This is because the upward adjustment of resources under resource-first generates a correspondingly higher cost share for the institutionalized spouse that reduces Medicaid expense. Additionally, the needs of the institutionalized spouse to have flexibility to pay for non-covered medical costs and expenses are better met by preserving that spouse's income for his or her own use as opposed to forcing a

transfer to the community spouse. Where the forced transfer occurs under income-first, less money is available to meet unanticipated needs of the institutionalized spouse, thus forcing that spouse to either go without, take back money transferred to the community spouse, or use the community spouse's resources, impeding her ability to live independently.

ARGUMENT

I. CONCERNS ABOUT THE COST OF THE RESOURCE-FIRST METHOD OF INCREASING THE CSRA, AND ABOUT THE EXTENT TO WHICH RESOURCE-FIRST WILL CAUSE COUPLES TO SHELTER ASSETS AND FAIL TO PAY THEIR "FAIR SHARE," ARE NOT BORNE OUT BY THE PRACTICAL APPLICATION OF THE RESOURCE-FIRST METHOD.

A set of concerns over the cost of resource-first has been raised by Petitioner and *Amici* in support of Petitioner. (Pet. and App. for Writ of Cert. at 20; Pet. Brief on the Merits at 45-47; Br. of *Amici Curiae* State Medicaid Agencies at 27-29; Br. of *Amici Curiae* American Health Care Association at 24-30.) These concerns can be summarized as follows: 1) resource-first will generate a considerable increase in the amount of public funding spent for Medicaid; and 2) resource-first will increase the extent to which couples will engage in asset sheltering practices and avoid paying their fair share of nursing home costs. These arguments are fundamentally flawed in the assumptions upon which they are based. The first flaw is the assumption that persons who are found eligible under resource-first are persons who, if they were to be

excluded from Medicaid eligibility by virtue of income-first, would then *stay off* Medicaid for the entire length of their nursing home stay. The second flaw is that Petitioner neglects to factor in the mandatory higher cost share generated by the resource-first method. Third, based upon the application of the *Blumer* decision in practice in Wisconsin, the Petitioner's estimate of 100 new cases found eligible under resource-first would take ten years to achieve and is thus exaggerated. When these faulty assumptions are examined, the arguments related to the cost of resource-first are unpersuasive.

A. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $10,000,000 for Every 100 Cases, Overestimates the Length of Time That Income-First Keeps People Off of Medicaid.

Petitioner's estimate (Pet. and App. for Writ of Cert. at 20) that resource-first will result in a "new" Medicaid expenditure of $100,000 per beneficiary is wrong because it assumes that persons found to have excess resources under income-first will stay off of Medicaid for at least 50 months. We do not dispute that 50 months is the average nursing home stay. However, it does not necessarily follow that the same figure is the length of time that persons kept off of Medicaid by the application of income-first, would ultimately go without Medicaid eligibility and payment. In reality, persons found ineligible under income-first will deplete their excess resources and will be on Medicaid in well under 50 months. Thus the per-beneficiary "cost" of resource-first is much lower than Petitioner asserts.

Consider the Blumers to illustrate the point being made here. The facts with respect to the Blumers' assets and income are set forth at pp. 13-14 of Petitioner's Brief on the Merits.[2] Assume that the Blumers are denied eligibility exactly as they were at the initial stages of their case. The economic support specialist advises them that Mrs. Blumer is $14,513 over the applicable asset limit. According to Petitioner, this is a Medicaid expense forever saved. According to Petitioner, at an average of 50 months of Medicaid expenditure at $2,000 per month, it is a savings of $100,000 by virtue of income-first. Or conversely, a new cost of $100,000 had resource-first been applied.

The missing link in Petitioner's analysis is that a denial in one month does not forever bar Medicaid eligibility. In reality, a couple whose resources exceed the CSRA will spend them in order for the institutionalized spouse to become eligible. Assume that the Blumers continue to spend their excess resources of $14,513 on nursing home care for Mrs. Blumer. The record indicates they diminished their resources at the rate of about $3,700 per month. In less than 4 months the couple will have

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[2] These facts are accurate, however the assertion at page 14 with respect to the "$25 monthly shortfall" implies that $25 was the shortfall which the Blumers sought to remedy through an increased CSRA, whereas actually the "$25 shortfall" was the amount by which Mr. Blumer's income fell short of the MMMNA *even after* he would have been allowed to keep all of the couple's excess resources under resource-first. The original shortfall was higher, and based upon the figures in the hearing decision (Pet. For Writ of Cert. 23a-33a) would have been about $85 before any community spouse income allocation or adjustment to the standard CSRA.

reached the standard CSRA. Mrs. Blumer will apply and be found eligible for Medicaid as of the beginning of the fourth month. The period of ineligibility under income-first is three months, not fifty. Thus the total "savings" generated by the income-first method is $6,000, not $100,000.

Information from the State of Wisconsin Division of Hearings and Appeals (DHA), the agency responsible for conducting fair hearings in Wisconsin Medicaid cases, is useful in assessing the accuracy of Petitioner's cost estimate. The DHA website posts copies of the fair hearing decisions that have been issued on the resource allocation question. *See http://dha.state.wi.us/static*. Since the Court of Appeals' decision in this case was published in August, 2000, fifteen decisions have been posted on the DHA website applying the resource-first rule. This is a far cry from 100 cases as estimated by Petitioner. In thirteen of those decisions, the community spouse was allowed to keep additional resources to increase the community spouse's income. However, in three of those cases the couples would also have been eligible under income-first, so they are not "new" cases of eligibility due to the resource-first method. In the remaining two cases the asset increase was disallowed because the assets in question did not generate any income.

Of the ten cases[3] where an increase was allowed, the range of *additional* resources allowed was between

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[3] The decisions where a *Blumer* resource increase resulted in new eligibility are: MRA-9/47931, MRA-70/47970, MRA-70/48333, MRA-22/48798, MRA-70/49065, MRA-67/49302, MRA-44/49009, MRA-44/47850, MRA-11/47906, MRA-25/48984.

$12,037 and $109,595. The range of *total* resources that the community spouse was allowed to retain was between $64,137 and $195,715. None of these Wisconsin cases allowed resources in excess of $300,000 as alleged by Petitioner (Pet. for Writ of Cert. at pp. 19-20 n.14; Pet. Brief on the Merits at p. 45.) The cases on either the low or the high end of this range were exceptional, and eight of the ten allowed a total asset allocation of between $107,000 and $137,000. These amounts do not reflect a significant asset sheltering scheme.

Resources in this range are depleted well before 50 months. Although the actual private pay nursing home rates for each case were not in the decisions, using the state's "average private pay rate" for nursing homes of $4,075, set pursuant to 42 U.S.C. § 1396p(c)(1)(A), the couple who originally was $12,037 over assets can deplete those assets on nursing home care in less than three months, becoming eligible as of the beginning of the third month. In the case of this very real couple, the income-first method would save (and thus the resource-first method would cost) $4,000 in Medicaid payments, not $100,000. On the high end, the couple who were originally $109,595 over assets would deplete those resources in 26 months, not 50. Averaging all ten cases, the average excess resource of $57,924 that was allowed by virtue of resource-first, but would have resulted in ineligibility under income-first, would be depleted in 14 months. An institutionalized spouse found ineligible under income-first could deplete resources in this time frame and then receive Medicaid for the remaining 36 months of the average nursing home stay. Since an institutionalized spouse initially found ineligible under income-first will still get 36 months of Medicaid, the "additional cost" of

resource-first is substantially reduced, to $28,000 per case, not $100,000.

The period of Medicaid ineligibility caused by excess resources under income-first may be further shortened because excess resources can be depleted by meeting needs other than nursing home care. As opposed to the mandatory cost sharing of an institutionalized spouse's income (with certain deductions), *see* 42 U.S.C. § 1396o; 42 C.F.R. § 435.832; Wis. Stat. § 49.45(7)(a) (1999-2000) *read in conjunction with* Wis. Stat. § 49.455(4)(a) (1999-2000), there is no mandatory requirement that a couple's excess *assets* be spent on nursing home care. Simply because a couple must spend resources in order to become eligible for Medicaid does not mean those resources will be spent to pay for the nursing home, resulting in cost savings to the Medicaid program.

It is SeniorLAW's practical experience that seniors who are facing an application for nursing home Medicaid do not come to the application debt-free. Many have outstanding medical debts, other debts, loans, mortgages or needs that must be addressed, such as home repair or personal care assistance for a community spouse. Since the creditors do not back away when a spouse is institutionalized, a leaky roof cannot go unmended, and personal care contracts could provide assurance for a community spouse who has his or her own care needs but now must live alone, seniors would be well advised to spend the excess resources on these matters. This is because *immediately upon* falling below the asset level an institutionalized spouse can reapply for Medicaid and be found eligible. Thus, even under income-first the Blumers could have been eligible the very next month provided

they spent the excess $14,513 to pay a $3,000 hospital bill, a $3,000 credit card debt, a new roof at $4,000 and the rest to pay down the mortgage. In fact, many couples would rather become eligible this way than through the complicated fair hearing process that the Blumers availed themselves of. In such a situation, the institutionalized spouse achieves eligibility under income-first only one month later than under resource-first, and as explained below, on a permanent basis the cost share paid by the institutionalized spouse will be less than it would have been under resource-first. To the extent that spending resources to pay other existing debts could be viewed as "asset sheltering," it is income-first that encourages this practice since income-first requires depletion of the assets to become eligible.

B. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $10,000,000 for Every 100 Cases, Is Undercut by the Amount of Time it Will Take for 100 Cases to Become Eligible, and is Negligible in the Framework of the Medicaid Budget.

In Wisconsin, as evidenced by the hearing decisions, ten "new" Medicaid cases have been approved by virtue of resource-first in a little over a year since *Blumer* was published. At this rate, the Petitioner's estimate of 100 new cases would take over ten years to achieve. As explained in the preceding section, the total cost of those 100 cases in today's dollars would be $2,800,000, spread over fourteen years, or $200,000 per year. This amount is negligible in the framework of the $2.9 billion Medicaid

budget for Wisconsin for a year, *see* Resp. Brief in Opposition to Petition, p. 4, App. 3a-6a. It is a pittance in comparison to the more than $100 million dollars *per year* approved for nursing home rate increases in Wisconsin's 2002-2003 budget. *See*, 2001 Wis. Act 16; *Summary of Highlights of 2001-2003 Budget for DHFS, located at http://www.dhfs.state.wi.us/aboutDHFS/OSF/BudgetSummary92101.pdf*. However, this significantly lower $200,000 per year figure is reduced even further when the higher mandatory cost share resulting under resource-first is factored in, as detailed below.

C. Petitioner's Assertion That Resource-First Will Result in an Additional Expenditure of $100,000 for Every 100 Cases, Is Defective Because it Fails to Consider the Higher Nursing Home Cost Share That Will Be Generated.

The next error in Petitioner's calculation on the cost of the resource-first method is that it appears to neglect the higher cost share that will be paid by the institutionalized spouse in the resource-first method. Because assets are being used to generate income for the community spouse, the institutionalized spouse is transferring less, if any, money to the community spouse.

When an institutionalized spouse becomes eligible for Medicaid, all of that spouse's income must be used as a "cost share" payment to defray the cost of care in the nursing home, with very limited exceptions. These are: 1) a personal needs allowance; 2) a community spouse income allowance, if given; 3) an allowance for dependent family members; and 4) the institutionalized

spouse's non-covered medical and remedial expenses. 42 U.S.C. § 1396r-5(d)(1).

The "Community Spouse Income Allowance" is a figure that represents the difference between the community spouse's income and the MMMNA, § 1396r-5(d)(2), but only to the extent that the institutionalized spouse actually makes that income available to the community spouse, § 1396r-5(d)(1)(B). Thus, the actual allowance under (d)(1)(B) could be less than the amount established under (d)(2) if the institutionalized spouse does not have sufficient income to provide the maximum possible allowance.

The amount that the nursing home spouse can allocate as the community spouse income allowance is directly dependent on the community spouse's income. Generally, in cases affected by resource-first, where the community spouse's income becomes higher as resources are increased, the community spouse income allowance from the institutionalized spouse is lower. Accordingly, *more* of the institutionalized spouse's income will go to the nursing home, and Medicaid costs will be reduced. (There are a number of cases where the community spouse's income, and also the resources available to use for an increased CSRA, are so low that even with an increased CSRA the institutionalized spouse would be able to allocate all of his or her income to the community spouse; however, these are cases where either income-first or resource-first would result in eligibility, and thus not material here.)

Again using the fair hearing decisions from real cases in Wisconsin, in the 10 favorable hearing decisions following the *Blumer* case, the average amount of additional income that was generated from the increase in the CSRA was $241.48 per month. This calculation is based upon the income generated by the assets as a whole in each case, and the proportion of that income which represents the asset increase over the couple's "standard" resource allowance. Because the community spouse's income is $241.48 higher per month due to the added resources, the community spouse income allowance from the institutionalized spouse is $241.48 lower per month. Consequently, the institutionalized spouse's cost share is $241.48 higher and the Medicaid cost is $241.48 lower. Over the average 36 months of Medicaid eligibility detailed in section IA of this brief, this higher cost share will reduce Medicaid payment by $8,693.28. Subtracting this from the $28,000 per-case cost set out in section IA herein, the further reduced per-case cost is $19,307, or a total cost per 100 cases of $1,930,700. This is over 80% lower than the cost estimated by Petitioner. Unlike the temporary deferral of Medicaid expense accomplished where an applicant who is found ineligible under income-first spends down the couple's resources and becomes eligible, the higher cost share generated by resource-first will exist as long as the institutionalized spouse remains in the nursing facility.

D. Income-First May Actually Cost More Money Than Resource-First.

In cases where couples do not use their excess resources to pay for nursing home care and instead pay the mortgage, medical bills, or other expenses, income-first can actually *cost more* Medicaid dollars than resource-first. One Wisconsin hearing case with a *Blumer* resource adjustment allowed an additional $63,516 in resources to make up for a $397 monthly shortfall in the community spouse's income. If income-first applied, they may have spent the excess $63,516 on a $40,000 mortgage payment, $3,500 hospital bill, and $20,016 on five months of nursing home care. The remaining 45 months in the average nursing home stay are covered by Medicaid at a cost of $2,000 per month, or $90,000. Under resource-first, Medicaid would have covered the entire 50 months, but the payment would have been reduced by the $397 per month higher cost share from the institutionalized spouse, so the total Medicaid expense would be $80,150, almost $10,000 less than under the income-first rule.

As a general rule, income-first saves money only where persons are kept off Medicaid for many months or stay a short time in the institution. Since the current rules allow persons to spend resources on other needs to become eligible quickly, and nursing home stays are long, it is likely that income-first could cost more money than resource-first in a large number of cases.

II. THE CONCEPT OF AN ANTICIPATORY HEARING TO SET A CSRA, AND THUS THE IMPLICATION THAT THE CSRA IS A "PRE-ELIGIBILITY" DETERMINATION, IS NOT SUPPORTED BY THE LANGUAGE OF THE STATUTE, IS WASTEFUL, AND IS PATENTLY UNFAIR TO COUPLES.

The Petitioner (Pet. Brief on the Merits at 28-30) and the *Amici* State Medicaid Agencies (Brief of *Amici Curiae* State Medicaid Agencies at 23-24) rely on the concept of an "anticipatory" or "forward looking" hearing, held at some point prior to the time that an institutionalized spouse applies for Medicaid, wherein all aspects of a couple's financial situation can be examined. Under this theory, the institutionalized spouse's income that could "potentially" be allocated to the community spouse under § 1396r-5(d)(1)(B) can be considered in determining whether or not to increase the CSRA.

It should be noted at the outset that *none* of the hearings that applied *Blumer* in Wisconsin were "anticipatory hearings" held in advance of the application process. All hearings were held upon denial of a Medicaid application. This *Amicus* knows of no case in this state where a fair hearing has been held to establish a community spouse resource level, MMMNA and community spouse income allowance, outside of the framework of an actual Medicaid Assistance application and denial.

A. The Language of § 1396r-5(e)(2) Requires an Application for Medicaid in Order for a Fair Hearing to Be Held Under That Statute.

Under the "notice and fair hearing" section of the spousal impoverishment law, § 1396r-5(e), while any couple may request a "notice" (commonly called a "snapshot") related to the amount of the community spouse monthly income allowance, family allowances, and the amount of community spouse resources, *see* § 1396r-5(e)(1), a *hearing* can only be requested "if an application for benefits . . . has been made." § 1396r-5(e)(2)(A). Not only is the requirement of an application set forth explicitly in the text of that provision, the statute also indicates that the hearing provided is one "described in section 1396a(a)(3)" which is the Medicaid statute that provides a fair hearing to "any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." It does not provide a fair hearing to persons wishing financial planning advice from a state hearing examiner. Petitioner's claim that an anticipatory hearing can take place is not supported by the statute.

A technical amendment to the statute confirms that Congress did not intend for an anticipatory hearing to take place. Originally, § 1396r-5(c)(1)(B), the provision for a "snapshot" asset assessment by the State Medicaid Agency, included a requirement that at the time of the snapshot, the State provide a notice indicating that the spouse "has right [sic] to a fair hearing under subsection (e)(2)(E). . . . " However, in the amendment the words "has right [sic]" were replaced with "will have a right" and corrected the statutory reference. *See* Family Support

Act of 1988, Pub. L. No. 100-485, § 608(d)(16)(A)(i). This correction, which changed the tense as well as adding the missing "a", indicates that Congress did not intend spouses to have a right to a hearing at the time of the snapshot, but rather that they are entitled to a hearing at the time of the application.

B. Because an "Anticipatory Hearing" Would Use Figures That May be Outdated by the Time of the Actual Application, it Would be Unfair to Applicants and Their Spouses.

The "anticipatory hearing" fails in practice, since it would require a hearing examiner to apply a *present* presumptive MMMNA and *present* presumptive spousal resource share to an application to be made sometime, perhaps over a year, in the future. Both the CSRA and the MMMNA are figures that are adjusted (historically upward) for inflation on an annual basis. §§ 1396r-5(d)(3),(f),(g). However, a hearing examiner would have no idea what those future adjustments would be and could not take them into account so as to provide accurate calculations ("If you apply in 2001, your MMMNA/CSRA will be $ A/B, if you apply in 2002, your MMMNA/CSRA will be $ C/D" and so forth.) To set a CSRA or MMMNA at an "anticipatory" fair hearing which presumably results in a binding decision, for an application that may not take place for over a year or even longer, would *always* result in the couple spending more resources than necessary. The only way that this hearing process becomes fair and accurate is in the context of a present application for benefits, taking into

consideration the MMMNA and CSRA formulae in effect as of the application date.

C. The Anticipatory Hearing Would Needlessly Use Significant Administrative Resources and Money.

The "anticipatory hearing" would be a monumental waste of administrative time and expense. In every case where a couple requested a notice of their asset and income allocation, they could request and receive a fair hearing *even if they had not applied for benefits*! Every couple where a spouse entered a nursing home could avail themselves of this process. With state records indicating 51,186 people admitted to nursing facilities in 1999, *see Wisconsin Annual Survey of Nursing Homes 1999*, (Nov. 2000) *available at http://www.dhfs.state.wi.us/provider/pdf/99nhhc.pdf*, many of whom would be married, this process could be costly indeed. It is unlikely that the cost of this exercise would be seen as well-incurred, since hearings could be required for couples who would never ultimately apply for benefits. The far more reasonable timing for the hearing is, as set forth in the statute, when the couple applies for benefits for the institutionalized spouse. In this context of determining eligibility, which focuses solely on whether the resource level is met, the post-eligibility community spouse income allocation is irrelevant.

III. THE PLACEMENT OF § 1396r-5(e)(2)(C) WITHIN THE FAIR HEARING STATUTE DOES NOT SERVE TO INCORPORATE THE (e)(2)(A) FACTORS INTO THE DEFINITION OF "COMMUNITY SPOUSE'S INCOME" AND IN FACT SUPPORTS A RESOURCE-FIRST MANDATE.

A. The Three Sections of § 1396(e) Function Separately.

Citing *Cleary v. Waldman*, 167 F.3d 801, 809 (3d Cir. 1999), *cert. denied*, 528 U.S. 870 (1999), *Amici* the State Medicaid Agencies assert that all five factors in 42 U.S.C. § 1396r-5(e)(2)(A) must be considered before an adjustment under (e)(2)(C) is made. Brief of *Amici Curiae* State Medicaid Agencies at 25-26. This conclusion is not accurate.

The five points upon which a hearing can be had under (e)(2)(A) are elements that can be in dispute in a spousal impoverishment situation. (A) is the "general" provision which allows spouses to contest the determinations of various elements themselves. Put another way, (A) allows spouses to request a hearing where the *calculations* are in dispute. On the other hand, (B) and (C) allow hearings where the calculations are not in dispute but either the *undisputed* resource allowance or *undisputed* MMMNA need to be adjusted to meet the needs of the community spouse. Thus, (A), (B), and (C) serve separate functions and are not interdependent. A spouse could ask for hearings under all three sections, each to address a separate problem. This might occur where, for example, a self-employed spouse disputes some aspect of the calculation of her income, and also claims that she has significant expenses that require the MMMNA to be adjusted

upward, and then establishes that she needs to keep more assets to meet that revised MMMNA.

B. The CSRA Adjustment Procedure at § 1396r-5(e)(2)(C) Does Not of Necessity Incorporate All Elements of (e)(2)(A).

While *sometimes* some or all of the five factors in (e)(2)(A) are interrelated or adjustment of one has an effect on another, it is not necessarily so. Each stands on its own. For example, a community spouse may seek a hearing on the determination of income otherwise available to her, § 1396r-5(e)(2)(A)(ii), where her earned income fluctuates or certain deductions from her income were not properly applied. This has nothing to do with the attribution of resources or the determination of the community spouse resource allowance. Similarly, the attribution of resources under (A)(iv) has nothing to do with the income generated by the spousal share of resources under (A)(iii). The attribution of resources has to do only with "determining the resources of an institutionalized spouse at the time of application" and thus the amount of resources available to the *institutionalized spouse*. § 1396r-5(c)(2). The resources of the *institutionalized* spouse have nothing to do with the income generated by the community spouse resource share.

Using the resource-first method does not obviate any of the matters contained in the "general" fair hearing provision set forth at (e)(2)(A). It does not obviate the need for a fair hearing under (2)(A)(i), the determination of the community spouse income allowance. In Wisconsin, the MMMNA is actually a range based upon the

existence and amount of "excess shelter costs" of the community spouse. Wis. Stat § 49.455(4)(c) (1999-2000); 42 U.S.C. § 1396r-5(d)(3)(A). For example, the current MMMNA range in Wisconsin is $1,935 – $2,175. The lower number is the "floor" which is a guaranteed amount that all community spouses are allowed to keep, provided that they have that much income to begin with. However, this "floor" can be raised by showing excess shelter costs, which under current figures must exceed $580.50 per month. For every dollar of shelter cost in excess of the $580.50, the MMMNA is raised correspondingly up to a "ceiling" amount of $2,175. Thus, if a spouse has $700 per month in shelter costs such as mortgage and taxes, the "excess" amount is $119.50 ($700 - $580.50 = $119.50). This amount is added onto the "floor" MMMNA of $1,935, resulting in a MMMNA of $2,054.50. This calculation affects the community spouse monthly income allowance, and is one that could easily raise dispute, in terms of the determination of excess shelter expenses. This calculation will not be eliminated under the resource-first method.

Other sections of (e)(2)(A) remain intact as well. Resource-first does not obviate the need for a hearing under (2)(A)(ii), the amount of income otherwise available to the community spouse. The community spouse may have disputes about the calculation of her earned or unearned income. Likewise, the determinations of the spousal share of resources, the attribution of resources or the determination of the CSRA could all turn on questions of ownership (in cases of property jointly owned with a non-spouse or property which a spouse claims is not owned by either the institutionalized spouse or the

community spouse), valuation, or availability of the resources in question even under the resource-first method.

As these examples illustrate, the provisions of (e)(2)(A) are not necessarily dependent on each other. Additionally, the use of the disjunctive "or" in (A) indicates that Congress felt them to be separate issues, *see Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979). Thus the placement of (e)(2)(C) with relation to these factors is insignificant and does not require their inclusion in the resource adjustment determination under that subsection.

C. Congress' Choice of Language and the Framework of the Fair Hearing Section Support a Resource-First Mandate.

The framework of the fair hearing section of the spousal impoverishment law suggests that Congress intended resources to be the primary factor in the adjustment under (e)(2)(C). This is because (e)(2) sets out first, a general subsection on matters that can be disputed, second, a way of increasing the *minimum income level* for the community spouse, and third, a way of increasing available *assets* for the community spouse. Under (2)(B) a spouse can claim that a community spouse needs a higher MMMNA income to meet expenses, and under (2)(C) a spouse can claim that the community needs additional resources to meet the MMMNA which in that section serves as a "cap" on the amount of resources that can be retained over the original CSRA.

It is unlikely that the means of increasing assets contemplated by Congress in (e)(2)(C) was through a transfer of income from the institutionalized spouse. This is because Congress had defined the concept of the income transfer from the institutionalized spouse, and did not use that defined phrase here. The income the institutionalized spouse is allowed to transfer to the community spouse was defined by Congress as the "Community Spouse Income Allowance". 42 U.S.C. § 1396r-5(d). Congress both established the procedure for calculating the permissible community spouse income allowance (§ 1396r-5(d)(2)) and for the transfer of an actual community spouse income allowance to the community spouse (§ 1396r-5(d)(1)(B)).

It is this community spouse income allowance upon which the entire income-first concept is based. Yet it is not present in(e)(2)(C). If Congress had intended for hearing officers under (e)(2)(C) to use the post-eligibility community spouse income allowance in the resource adjustment calculation, it would have used the phrase it had already gone to the trouble of defining in the statute. But the community spouse income allowance is not included in the CSRA adjustment subsection, thus evidencing that Congress did not intend it to be a factor in the calculation. " 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Bates v. United States*, 522 U.S. 23, 20-30 (1997) *quoting Russello v. United States*, 464 U.S. 16, 23 (1983).

The *Amici* State Medicaid Agencies claim that resource-first gives "short shrift" to § 1396r-5(d); however, their own argument that this section is relevant only succeeds if this Court ignores the fact that (d) also specifically defines a phrase signifying the transfer of income from the institutionalized spouse to the community spouse – the "community spouse income allowance" – a phrase that is tellingly absent from (e)(2)(C). On the other hand, the resource first method gives the proper weight to § 1396r-5(d), allowing it to stand on its own as a post-eligibility calculation that allows a variety of deductions from the institutionalized spouse's cost of care liability to the nursing home, one of which is the community spouse income allowance.

IV. RESOURCE-FIRST DOES NOT MAKE A NULLITY OF THE STANDARD INCOME ALLOWANCE

Resource-first does not make a nullity of the standard income allowance, as claimed by *Amici* the State Medicaid Agencies. Brief of *Amici Curiae* State Medicaid Agencies at 25-26. This is best illustrated by use of the Wisconsin fair hearing decisions post-*Blumer*. In 100% of these cases, the increased CSRA was *not* enough to bring the community spouse income up to the MMMNA that had been set for each case. In all cases the standard income allocation was still valid since the institutionalized spouse still allocated a portion of his or her income to the community spouse, albeit much less. The *Blumers* themselves were this type of case, since even if all of their assets were retained to generate income for Mr. Blumer, his income still fell about $25 short and Mrs. Blumer could have

transferred that amount to him as a community spouse income allowance.

V. THE RESOURCE-FIRST METHOD PROVIDES THE GREATEST BALANCE BETWEEN THE NEEDS OF THE COMMUNITY SPOUSE, THE INSTITUTIONALIZED SPOUSE, AND THE STATE'S INTEREST IN COUPLES PAYING THEIR "FAIR SHARE."

The adjustments made under resource-first most appropriately balance the needs of all of the interests involved in the spousal impoverishment considerations: the community spouse, the institutionalized spouse, and the state's interest in defraying Medicaid costs by requiring couples to pay their "fair share" for nursing home care. Where a community spouse's income is low, the CSRA can be adjusted upward requiring less *resources* to be depleted on nursing home care or otherwise, but the institutionalized spouse's cost share goes up, requiring more *income* to be spent on nursing home care. Either way, under resource-first the couple pays its fair share for the institutionalized spouse's care. Conversely, "fair share" payment is only guaranteed under income-first if a couple spends their excess resources on nursing care, which is *not required by current law*. Accordingly, it is the income-first methodology that induces asset sheltering strategies that were discouraged by Congress.

Additionally, the resource-first method also provides the most flexibility for the institutionalized spouse, who somehow seems to have been lost in this debate, to meet his or her own needs. While § 1396r-5(d)(1)(B) provides institutionalized spouses the *option* of transferring funds

to the community spouse, and does not mandate that transfer, the income-first rule has the effect of forcing the institutionalized spouse to transfer the funds or leave the community spouse living with income below the MMMNA. This forced transfer ignores the needs of the institutional spouse. It was indeed recognized by Congress, in (d)(1)(D), that institutionalized spouses may have medical or remedial needs in the nursing facility that are not covered by Medicaid. Some of these expenses that are not covered in Wisconsin could include certain dental, vision, and hearing related services, private duty nursing services, or other personal care items. These medical needs are not necessarily foreseeable at the time of application and may arise at any time after the spouse enters the institution.

At a very minimal $2,000 asset level, the institutionalized spouse does not have a significant pool of resources upon which to draw to meet a non-covered expense. The resources of the community spouse are supposed to be unavailable to the institutionalized spouse after eligibility, *see* § 1396r-5(c)(4). Thus the institutionalized spouse must use his or her income to meet these expenses. Under the resource-first rule, the institutionalized spouse has a greater amount of income at his or her "disposal" to use for these medical or remedial expenses, and when not in use for that purpose it pays for the underlying care in the nursing home. However, where the couple is prohibited by income-first from using assets to raise the community spouse's income to the MMMNA, the institutionalized spouse must transfer his or her income or leave the community spouse with income below the MMMNA. If a non-covered medical or

remedial need arises in the institution, after Medicaid eligibility is attained through depletion of the couple's resources under income-first, the cost of that care must be paid either by the institutionalized spouse *potentially at the expense of the transfer to the community spouse* or by using the community spouse's assets. Thus the effect of the income-first rule impedes the institutionalized spouse's legitimate need to be able to pay for non-covered expenses, or else forces the community spouse to pay for them by "giving back" the income that was transferred to her or the assets that she could retain. This was not the intent of Congress in establishing the spousal impoverishment protections.

CONCLUSION

For the reasons set forth herein, *amicus curiae* SeniorLAW/Legal Action of Wisconsin respectfully requests that this Court affirm the Order of the Wisconsin Court of Appeals in all respects.

Respectfully submitted,

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